

43127-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

State of Washington
Respondent

v.

TIMOTHY P. WHITTLES
Appellant

43127-1-II

On Appeal from the Superior Court of Kitsap County

Cause No. 11-1-00919-8

The Honorable Sally Olsen

REPLY BRIEF

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I. AUTHORITIES CITED

Washington Cases

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II. STATEMENT OF THE CASE

Timothy Paul Whittles was accused of trashing the home of Susan Ann Christopher on the night the couple ended their relationship. CP 5-6. A jury found him guilty of first degree malicious mischief with a domestic violence enhancement. CP 30-31.

In addition to the responding police officer, the State's case only witnesses were Ms. Christopher, and Christopher's long-time friend Derrick Ingulsrud. RP 22, 58, 126. Their testimony was contradictory and inconsistent,¹ and three defense witnesses contradicted the testimony of both. RP 171, 189, 194. Mr. Whittles challenges the sufficiency of the State's evidence to prove guilt beyond a reasonable doubt.

Whittles also challenges the effectiveness of his trial counsel for failing to request a mistrial. In response to a neutral question, Ms. Christopher testified that she returned to her home at a time when she knew Mr. Whittles had an appointment with the public defender on another matter. RP 87. Later, she stated that she chose not to report that Whittles brandished what she believed was a gun and may even have fired at her, because she did not want to get Whittles in trouble with the police "again." RP 121. Defense counsel did not move for a mistrial, which Whittles contends constitutes ineffective assistance of counsel.

¹ Additional facts specific to each issue are included in the argument section.

In sentencing Whittles to a standard range sentence, the court imposed standard legal financial obligations including two “contributions” to the Kitsap County prosecuting attorney’s office. CP 39. The State concedes that these extraneous financial penalties are unlawful. Brief of Respondent (BR) 21.

III. **ARGUMENTS IN REPLY**

1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

The State presents a transparent “straw man” argument that Whittles is asking this Court to weigh the credibility of the witnesses. BR 14. This is wrong. The Court will not do that, and Whittles does not suggest otherwise. Rather, Whittles is asking the Court to hold that the State’s evidence did not meet minimum criteria of reliability sufficient to support a finding of guilt beyond a reasonable doubt. Specifically, the testimony, including that of the State’s own witnesses, was so conflicting and contradictory that it is insufficient on its face to establish any fact at issue beyond a reasonable doubt.

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Bryant*,

89 Wn. App. 857, 869, 950 P.2d 1004 (1998), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

A sufficiency challenge admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006), citing cases.

Specifically, the mere fact that a plausible explanation can be conceived to explain irreconcilable inconsistencies is not sufficient to establish a disputed fact, because "could have been" is not the relevant standard. Proof beyond a reasonable doubt is the standard, and devising possible explanations for inconsistent testimony does not itself prove anything beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995) (conflicting lab results).

Here, the State did not even attempt to reconcile the wildly conflicting testimony, including that of its own key witnesses.

The State's case was based on the testimony of the responding police officer and two witnesses, Ms. Christopher and her long-time friend Derrick Ingulsrud. RP 22, 58, 126. The only coherent testimony was that

of Detective Mahler, who established the undisputed fact that somebody trashed Ms. Christopher's premises. Brief of Respondent (BR) 1-3, 8. The evidence offered by the State to establish the identity of the perpetrator, by contrast, is so inconsistent and contradictory as to be insufficient to convict Mr. Whittles of any crime.

Christopher testified that, on September 20, 2011, she arrived home at 6:00 or 7:00 p.m. to find her friend of 20 years, Derrick Ingulsrud, already there. BR 4; RP 62-63, 127. The coffee table and counter were littered with empty beer cans. RP 63. Christopher said she left for her sister's house at around 9:00 p.m. to take a shower² and visit with her niece who had cancer. RP 64.

Christopher said she received a text message from a neighbor at around 11:30 p.m. BR 5; RP 69, 72, 76. Ingulsrud was at the friend's house. Christopher spoke to him, and Ingulsrud met up with her at the sister's house at around midnight. BR 6; RP 76-77.

While Ingulsrud was en route, Christopher immediately called home. RP 73. Whittles demanded that she come home. RP 74, 75.

Ingulsrud's version was that he did not arrive at Christopher's house at 6 or 7 pm. at all. Rather, it was 10:30 or 11:00 o'clock at night, and Christopher did not join them later, but was at home when Ingulsrud

² Christopher's well pump had burned out. RP 64.

arrived. BR 9; RP 128. According to Ingulsrud, Whittles did not consume any alcohol whatsoever before Christopher went to her sister's, and there were no empty beer cans lying around. RP 150-51. And rather than 9:00 p.m., Christopher did not leave for her sister's until half an hour after Ingulsrud arrived, that is around 11:00 or 11:30 p.m. BR 9; RP 129. Ingulsrud had keys to Christopher's house. RP 134.

After Christopher left, Ingulsrud said he and Whittles worked on the pump for a while without success. BR 9; RP 129. Ingulsrud went to his cousin's house to collect some PVC pipe they needed. RP 132. He stayed for an hour, and did not return to the Christopher home until around 1:00 a.m. BR 9; RP 133. When he returned with the pipe, Whittles was drinking whiskey and seemed angry. RP 134. Ingulsrud heard banging and maybe breaking glass before Whittles came to the door and told Ingulsrud to leave. RP 134.

Ingulsrud went back to his cousin's house and called Christopher. to urge her not to go home. RP 137. This was the first communication Ingulsrud had with Christopher. RP 137. The call must have been close to 2:00 a.m., rather than 11:30 p.m. as Christopher testified. Ingulsrud then returned to the Christopher residence again. RP 138. He saw broken glass on the floor that may or may not have been there earlier in the evening. RP 140. He then went to Christopher's sister's and again urged

Christopher not to go home. RP 140-41. She and Ingulsrud sat in the car while she made a call to Whittles on the speaker phone. Whittles told her he was leaving. RP 141.

Christopher and Ingulsrud parked in a driveway near her home and watched to see if Whittles left. RP 78. Whittles drove by and spotted her car. RP 79. He tried to block her in. RP 79. Christopher and Ingulsrud both claimed Whittles fired a shot at them. RP 106, 144. Ms. Christopher told Deputy Mahler the next day, however, that she did not think Whittles had a gun. RP 118.

Christopher said she and Ingulsrud then went directly to the home of another friend in Gorst where they spent the night. RP 85. Ingulsrud said he and Christopher did not go directly to Gorst, but instead went to a Jack-in-the-Box to eat and called the friend from the restaurant. RP 145, 159. By this time it was around 3:00 a.m.. RP 160. The friend was not home, so Christopher and Ingulsrud slept in the car. RP 146.

On the following afternoon, Christopher called 911 from Ingulsrud's house. RP 116. But the State did not attempt to explain why Mr. Ingulsrud — a crucial independent material witness — did not accompany Christopher back to her house to talk to the police. RP 236.

The State must present substantial evidence proving every fact the jury needs in order to find the essential elements and convict. *State v.*

Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Guilt cannot be based upon guesswork, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

Here, it cannot be discerned what evidence the State would have the jury or this Court accept as true, and the only logical inference to be drawn from the testimony of these witnesses is either that they did not witness the same events or that their veracity is not sufficiently reliable to prove any disputed fact beyond a reasonable doubt. Even ignoring the defense witnesses, the State’s own evidence contains so many inconsistencies and mutually exclusive claims as to be utterly insufficient to overcome the presumption of innocence and prove Whittles guilty beyond a reasonable doubt.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). Retrial is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The Court should reverse Whittles’s conviction and dismiss the prosecution with prejudice.

2. TRIAL COUNSEL WAS INEFFECTIVE
FOR FAILING TO SEEK A MISTRIAL
WHEN WHITTLES'S PRESUMPTION OF
INNOCENCE WAS COMPROMISED.

Susan Christopher communicated to Mr. Whittles's jury — not once but twice — that Whittles was facing unrelated criminal charges. The State disputes that failing to request a mistrial was not was ineffective assistance. BR 18.

Trial counsel is presumed to have rendered reasonably effective performance, but this presumption is rebutted by a showing that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). That is the case here.

Whittles's jury was tainted by the erroneous admission of evidence that he was currently being prosecuted for other crimes. Such evidence is highly prejudicial, because juries are presumed to regard it as proof of propensity to commit the charged crime. *State v. Herzog*, 73 Wn. App. 34, 49, 867 P.2d 648, *review denied*, 124 Wn.2d 1022 (1994); *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948). Accordingly, no plausible reason would justify allowing the tainted jury to render a verdict.

The jury learned from Christopher that Whittles had an appointment with the public defender on another matter on the afternoon following the alleged current offense. RP 87. The court sustained counsel's objection, but counsel did not ask for a limiting instruction or request a mistrial. *Id.* Again, the jury was told that Christopher did not call the police when she thought Whittles had fired a gun at her and Ingulsrud because she did not want to get Whittles "involved in a police situation again." RP 121.

Defense counsel again failed to move for a mistrial, saying merely: "Okay. I just want to make sure that I understand it." RP 122. This was grounds for a mistrial. This was a most serious irregularity, from which the jury could conclude that Mr. Whittles was a habitual law-breaker who may have a propensity to commit crimes against Ms. Christopher; it was not cumulative of evidence properly admitted; and the jury was not instructed to disregard it because defense counsel failed to call the court's attention to the violation, and thus failed to provide an opportunity for the court to do so. *See, State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Counsel's failure cannot be characterized as a reasonable strategic or tactical maneuver, and it was manifestly prejudicial. Mr. Whittles's

presumption of innocence was shattered, and it was no longer possible for him to be tried by an impartial jury.

A new trial is necessary when a defendant is so prejudiced that nothing short of a new trial can insure that he will receive a fair trial.

State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

This is such a case. Reversal is required.

3. THE COURT EXCEED ITS AUTHORITY
BY IMPOSING A FICTITIOUS LEGAL
FINANCIAL OBLIGATION.

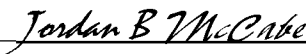
The State concedes that the court exceeded its authority in imposing a \$500 contribution to the Kitsap Co. Special Assault Unit and a \$100 contribution to the prosecuting attorney's Expert Witness Fund.

The Court should remand for resentencing to eliminate non-standard, unauthorized financial obligations.

IV. **CONCLUSION**

The Court should reverse Mr. Whittles's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice. At minimum, the Court should remand for resentencing.

Respectfully submitted this 9th day of October, 2012.



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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served this day with the foregoing Reply Brief by e-mail via the Division II portal:

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